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Abe Pomerantz Is Watching You

This New York lawyer has made a fortune championing the rights of minority stockholders. As thousands of businessmen have learned to their cost, he's a tough man to tangle with.

by Spencer Klaw

If the past is any guide, at one time or another during the next year the officers or directors of scores of large, publicly held corporations will be handed a depressing legal document. It will inform them that they have been named as defendants in a minority-stockholder suit. The news will be particularly depressing if the plaintiff is represented by Abraham Louis Pomerantz, a sixty-four-year-old New York lawyer. Pomerantz has been suing corporate insiders for thirty-five years, and in four out of five cases the defendants have had to pay sizable amounts of money out of their own pockets.

Among those from whom Pomerantz has wrested large sums are John C. Doyle, the former president and chairman of Canadian Javelin. Doyle agreed to turn over $13,350,000 in cash and other property to Canadian Javelin after Pomerantz accused him of issuing huge blocks of stock to himself for inadequate or fictitious considerations. (Pomerantz also contended that Doyle had flown to Europe in a company plane with a party of friends for the sole purpose of attending wine festivals.) In a more recent case Pomerantz forced Louis Wolfson and two associates to pay $750,000 to Merritt-Chapman & Scott; as chairman, Wolfson had transferred $9,800,000 of company funds to a non-interest-bearing account in a bank from which he was getting a big personal loan.

Doyle and Wolfson, of course, have had extensive trouble with the law, but most of Pomerantz' victims are simply businessmen who take a more liberal view than he does of the perquisites due an executive or controlling stockholder of a public corporation. A few years back, for example, the directors of Warner Brothers Pictures gave the company's president, Jack Warner, options on 60,000 shares of stock. Pomerantz sued on the ground that this constituted a waste of corporate assets. Since Warner already owned a huge block of the company's stock, Pomerantz contended that he didn't need further incentives to make him put forth his best efforts on the company's behalf. As a result, Warner and three other executives named in the suit had to give up $400,000 of their option profits. Royal C. Little has also run afoul of Pomerantz. Under questioning in court, he admitted that a foundation created by him had profited handsomely in transactions with Textron, which Little also controlled. The suit was settled when Little agreed to pay Textron $400,000.

In the last several years Pomerantz has paid special attention to the managers and directors of mutual funds. Among other things he has accused them of charging too much for managerial services. So far, the managers of thirteen funds, including Investors Mutual, the Wellington Fund, and National Securities Series, have settled suits started by Pomerantz by agreeing to a reduction in their fees. According to the SEC, those reductions are costing the managers of the thirteen funds a total of over $6 million a year. In another mutual-fund case Pomerantz got a $1-million judgment against some of the directors of Managed Funds. Most of these directors were collecting management fees although the fund was, in fact, being managed by the brokerage house through which its market orders were channeled. One hapless director was a retired obstetrician who hadn't made a penny in fees, and whose only sin was that he hadn't taken his job seriously enough to find out what was going on.

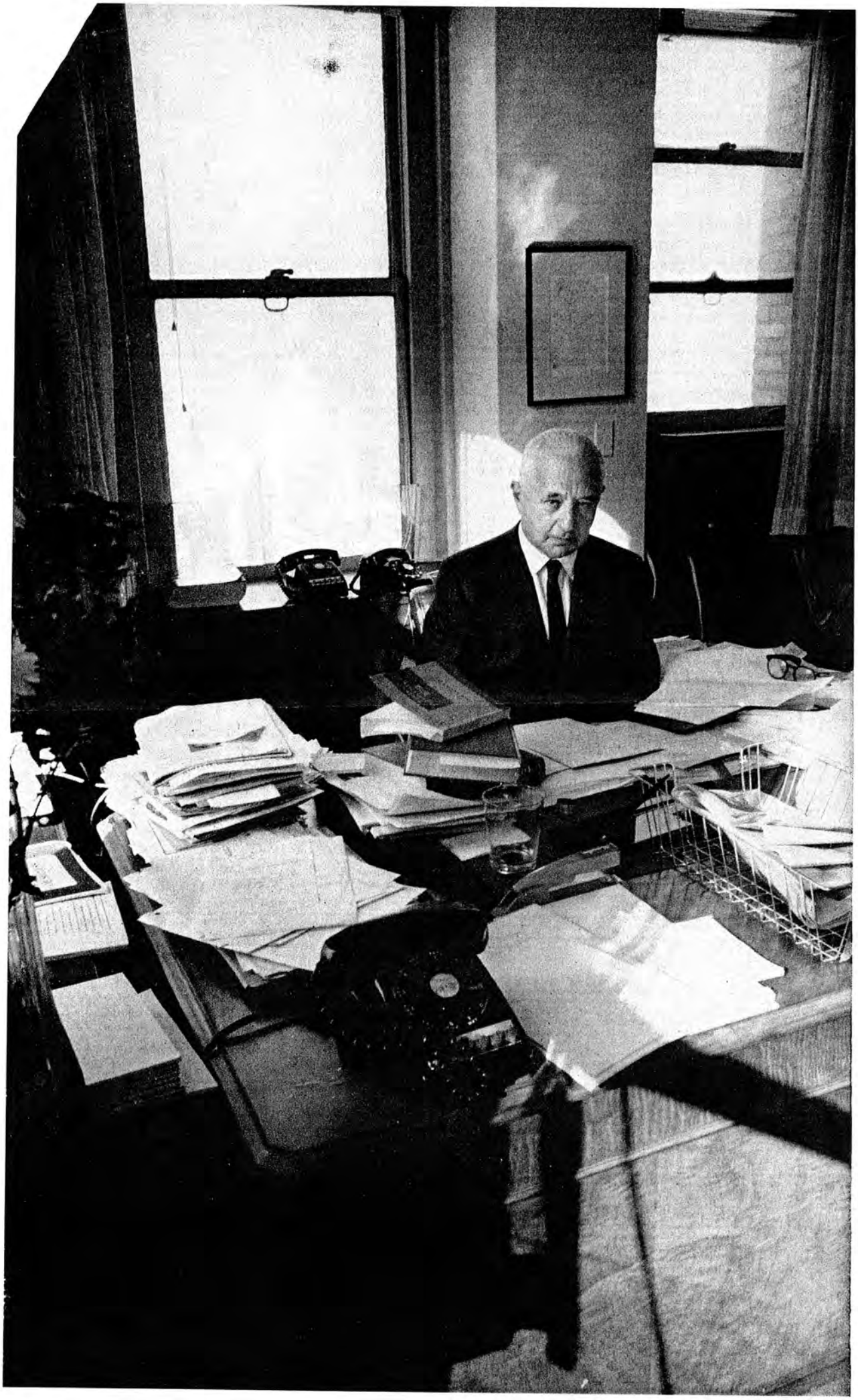
Pomerantz starts about a dozen shareholder suits a year and now has some twenty-five such cases on his docket. In several of these the defendants are large investment-banking and brokerage firms—they include Lehman Brothers and Lazard Frères—that he is suing in connection with their management of mutual funds. Pomerantz' main contention in these, more recent, mutual-fund cases is that partners or principals of the firms have been pocketing hundreds of thousands of dollars in commissions on business that could have been handled at a much lower cost in the so-called third market. He is also suing A.T. & T. to recover millions of dollars that he claims the company has illegally collected from some of its operating subsidiaries by overcharging them for services and equipment. The mutual-fund managers and A.T. & T., of course, deny the charges.

At one time Pomerantz' practice consisted almost entirely of representing plaintiffs in minority-stockholder suits. Over the years, however, he has been retained as defense counsel by more and more businessmen against whom other lawyers have brought such suits. He now spends at least half his time defending business executives instead of suing them. Currently he is defending officers and directors of PepsiCo, Columbia Pictures, Gulf & Western Industries, and twelve other large corporations in stockholder litigation of one kind or another. Many of the defendants in these suits first met Pomerantz when they were successfully sued by him, and logically decided that they preferred having him on their side.

The Fairchild Camera caper

Pomerantz is a big, fast-moving, friendly man who is shaped and looks rather like a giant panda. He grew up in Brooklyn, in a kosher household, and his voice has a certain rabbinical resonance. He has earned his reputation —and a modest fortune—through his mastery of the shareholders' derivative suit, an action in which the plaintiff's right to sue is derived from the corporation on whose behalf he is suing. In other words, the minority shareholder is taking the part of the corporation against its own officers or directors. The workings of this device are illustrated by a suit Pomerantz brought in 1960 against the directors of Fairchild Camera & Instrument Corp.

In this case, as in most cases that he takes, Pomerantz never met the plaintiff, Mildred Schram. He got a call from a New York lawyer who told him that in 1957, when Fairchild had hired a new president, John Carter, it had given him options on nearly 24,000 shares of Fairchild



Pomerantz' office, on the thirty-sixth floor of a Madison Avenue skyscraper that is long past its prime, reflects the unpretentious tastes and disorganized working habits of its occupant. Although Pomerantz makes twice as much money as the average senior partner of a big Wall Street law firm, he does not believe in wasting it on paneled walls, antique desks, or other elegant appointments.

Duane Michaels

stock. By 1960 these options were worth more than $8 million. The lawyer suggested this might be ground for a lawsuit, and added that he had a client who owned a few shares of Fairchild stock, and was prepared to sue.

Pomerantz discovered, on checking, that there had not been any serious technical defects in the way the options had been granted. But he decided to sue anyway. "The real basis for our case was the sheer, monumental profit that Carter had made," he says. To win, Pomerantz had to show that Carter's services couldn't possibly have been worth $8 million over and above his salary, and that giving him options on so much stock had been "a waste and gift of corporate assets." But in a pretrial deposition taken by Pomerantz, Carter made no really damaging admissions. Furthermore, it was difficult to accuse Carter of having taken advantage of his position as an insider. He hadn't even been working for Fairchild Camera at the time the options had been offered to him. He had been at Corning Glass Works, and the options were an inducement to join Fairchild.

Fairchild Camera's directors retained Abe Fortas, then a practicing Washington attorney, to defend them. Fortas pointed out to Pomerantz that his case was not a terribly strong one. After some bargaining, the lawyers arrived at a settlement under which Carter agreed to surrender $750,000 worth of his stock options. In June, 1961, this was approved by a Delaware court.

Pomerantz still had to collect his fee. Any benefits that are gained in a derivative action go to the corporation, and the suing stockholder's pro rata share of a million-dollar recovery may amount only to an increase of a few dollars in the book value of his stock. The plaintiff's lawyer cannot, therefore, look to his client for his fee, and if he loses a case he gets nothing at all. If he wins, however, he is entitled to a share of the booty. Addressing himself to the question of how big that share could be, the late Judge John B. Woolsey once observed that "allowances in causes of this kind . . . should not be niggardly, for appetite for effort in corporate therapeutics should, as in salvage and in bankruptcy cases, be encouraged." In general, the courts have gone along with this reasoning, and in the Fairchild Camera case Pomerantz asked for, and got, $175,000 or 23 percent of what he had recovered for the company. Out of this, he paid $55,000 as a forwarding fee to the lawyer who had brought him the case, and $25,000 to a Delaware lawyer whom he had retained as attorney of record. Even after these deductions, Pomerantz and his partners were left with at least twice as much money as a big Wall Street law firm would normally get for spending a comparable amount of time on legal work of comparable difficulty and importance.

A rave from "Variety"

In the first twenty or thirty years of this century, most stockholder suits were instigated by lawyers whose principal aim was to be bought off, and actions of this kind became known as strike suits. (The term apparently derives from the hit-and-run nature of the suits.) Strike suits are not unknown today, and some lawyers still tend to look on all minority-stockholder suits as extortion. "There are lawyers around town who think that anyone in Abe's line of business is a bastard," a partner in a leading Wall Street firm remarked recently. "But they have to admit Abe is an honest bastard." The point of this backhanded compliment is that when Pomerantz brings a suit, it is likely to have a good deal of merit; and that he will rarely accept a settlement that does not provide substantial benefits for the stockholders. Many corporation lawyers concede privately that Pomerantz, by simply existing, helps them to keep their clients honest.

Although Pomerantz grew up in modest circumstances, he is quite free of the pomposity that sometimes afflicts self-made men. Like most successful courtroom lawyers, he is a bit of a ham, but he knows this as well as anybody else. In 1965, a *Variety* reporter, Ronald Gold, covered a trial in which Pomerantz was appearing, and then wrote it up in the form of a movie review. "Though he doesn't get top billing," Gold wrote, "Abe Pomerantz, playing one of two lawyers for a couple of worried investors, does the standout job. Managing to be both breathless and stentorian, the gray-haired, portly veteran delivers a ringing indictment of legalistic trickery, all the while letting the audience know that along with his sincere emotion he's just as clever as the opposition."

No one would guess from the style in which Pomerantz lives and works that in an average year he makes well over $350,000, a figure that only ten or twelve other lawyers in the U.S. can match. His office is a drab, beige room, in which most of the chairs, as well as Pomerantz' desk, are piled high with legal documents. When he goes home, it is to the penthouse of an aging apartment hotel, unfashionably (though magnificently) situated on New York's Riverside Drive, where he and his wife, Phyllis, have lived for twenty-one years. He spends vacations traveling in Europe or staying put on Martha's Vineyard, where he owns a modest summer house and a rowboat.

Defending the capitalist s.o.b.'s

Pomerantz' dislike for conspicuous consumption is no doubt associated with the fact that for more than forty years he has been a socialist. "When I was growing up I lived in Brooklyn, in Brownsville and in Williamsburg, and I saw a lot of poverty around me," he recalled not long ago. "Now there are two ways you can react to poverty. You can say, 'This ain't for me—this is for the other guy. I'm going on to become like the guy—you know, Sammy Glick—in *What Makes Sammy Run?*' And there's the other fellow—I think he's more nearly like myself—who even if he were worth a hundred million dollars would still have empathy with the poor. I'm an acquisitive person. Let's not kid ourselves about it, I love the buck. I'm *for* it. I'm out to make it. But with the money I've made, I haven't forgotten that it's a hard, cruel world, and when it's a question of the rich against the poor, I'm for the poor."

Given Pomerantz' political views, and his emotional identification with the poor, one might think he would be unhappy about the number of rich businessmen who are now his clients. On the contrary, he is gratified that so many men who can afford to hire the best legal talent in the country have turned to him. "When I sued Roy Little, and the next year he asked me to represent him in a suit, this titillated my ego," he says. He also gets a special satisfaction out of doing a first-rate job for a client whose actions he disapproves of. "I've defended some of the worst sons of bitches in America," he says proudly.

Although Pomerantz often refers to himself as " a poor boy from Brooklyn," it was in his late teens and twenties that he felt the pinch of poverty rather than in his actual boyhood. His father was a Russian Jew who came to Brooklyn in 1895, and became a builder of small apartments. He prospered in a modest way, and he could easily

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have sent Abe to college when he graduated from high school in 1920. He didn't, however. "Pop measured the value of an education by the buck," Pomerantz says. "And in those days you could be a lawyer without going to college." For the next four years, while holding down a succession of full-time jobs, Pomerantz studied law at night at the Brooklyn Law School.

He got his degree in 1924, worked briefly (for $4 a week) for a Manhattan lawyer, Milton C. Weisman, and then struck out on his own. For several years he shared a single room and a stenographer with three other young lawyers. "When one of us had a client coming in, the other three would disappear," Pomerantz recalls. "When there weren't any clients, there was a knock-rummy game. We played a lot of knock rummy." Occasionally his father would steer some real-estate work his way, or he would be given a brief to write by a Brooklyn lawyer who specialized in personal-injury cases, and whose office walls were hung with framed photostats of checks representing awards he had won for his clients. But in 1929 the elder Pomerantz' business failed, and the lawyer who had been sending Abe briefs was disbarred for ambulance chasing. During one hectic period, Pomerantz supported his wife and his two young children mainly by operating a mail-order research service that answered queries from other lawyers for $5 apiece. The queries came in quickly enough, but even by working seventeen or eighteen hours a day Pomerantz could seldom answer more than eight or nine a week. "It was a phenomenal success from which I almost died," he says.

There's gold in the National City Bank

Then, when Pomerantz was thirty, he got a call from the widow of a man who had been his high-school gym teacher. She told him that her husband had left her twenty shares of stock in the National City Bank of New York. The stock had once sold for $585 a share, but after the crash in 1929 the price had fallen to $17, and she wanted to know if there was anybody she could sue. Pomerantz said there wasn't.

Soon afterward, however, the Senate Banking Committee began an investigation of stock-market practices and, among other witnesses, called National City's chairman, Charles E. Mitchell. Under questioning by Ferdinand Pecora, the committee's counsel, Mitchell admitted that he and the other principal officers of the bank had been in the habit of setting aside for themselves a large percentage of the bank's profits as incentive bonuses—an arrangement that had netted Mitchell alone $608,868 for the first six months of 1929.

It struck Pomerantz that no one needed that much incentive. He got in touch with the widow and told her that if she would sue, he thought there was a chance of forcing Mitchell and the others to return some of their bonus money. He explained that, at best, this would increase the book value of her stock by only a few cents a share, but that she had nothing to lose. When she agreed, Pomerantz retained a well-known New York lawyer, David L. Podell, to try the case. Podell won a $1,800,000 judgment for the bank, and a $450,000 fee for the plaintiff's attorneys. Pomerantz had made a poor bargain with Podell, and even though he had collaborated actively throughout the trial, his share of the fee amounted to only $60,000. Still, this was more than three times as much money as he had cleared during all of his first ten years at the bar.

"The word got around," Pomerantz says. "People would call up and say, 'Hey, I've got a case like the one you just won against the National City Bank!' " A stockbroker sent around a niece who owned some stock in the Chase Bank, whose officers had also figured prominently in Pecora's script. Pomerantz again retained Podell, and in 1937 they got a $2,500,000 settlement. This time Pomerantz' share of the fee was $150,000.

Soon afterward, Pomerantz tackled William Randolph Hearst, who had organized a company called Hearst Consolidated Publications and had then sold its preferred stock to the public. "It was a real widow-and-orphan stock," Pomerantz recalls. "Hearst peddled it through his own newspapers at $25 a share. When the price went down to $8 a share, people began saying, 'Hey, I've been defrauded!' " Pomerantz contended that Hearst had sold several money-losing newspapers to the company for a great deal more than they were worth. After a long trial, the court agreed, and Hearst and some of his associates were ordered to pay the company $5 million. Pomerantz and a number of lawyers and accountants who had worked with him on the case got $800,000.

By this time Pomerantz had decided to make a career out of bringing stockholder suits. "A lot of people were doing it on the side, but not full time," he says. "It was a risky choice for me. If I'd lost a few cases at the beginning, I'd have been out of business. But, to be honest, it was easy for me to go down that road. I didn't have any other practice. My alternative was knock rummy." As it turned out, Pomerantz' timing was excellent. The new Securities Act required corporations to report all insider dealings in detail, and these reports proved to be a rich lode from which to mine stockholder suits.

For a few years, Pomerantz was quite active in Democratic party politics. (He was an unsuccessful candidate for the New York State Supreme Court in 1945.) And in 1946, on the strength of his familiarity with complicated financial transactions and his reputation as a tenacious trial lawyer, he was sent to Nürnberg by the U.S. Government to prosecute German industrialists. He stayed eight months, and then quit with an angry blast at the Truman Administration for not really wanting to get on with the trials. In 1948, when Henry Wallace ran for the presidency, Pomerantz was his campaign treasurer. "I think now that backing Wallace was a mistake," Pomerantz says. "But I believed we needed a man who would come out with a clarion call for progressivism and peace, and so I got behind him." Since 1948, while Pomerantz has been a generous contributor to civil-rights organizations and lately to anti-war groups, he has devoted himself almost exclusively to his law practice.

"Kind of friendly"

In the mutual-fund suits that have taken up so much of Pomerantz' time in recent years, he has hit hard at the role of the funds' independent or unaffiliated directors, who legally must not be connected in any way with the brokerage firm or investment company that manages the fund's investments. On the theory that there should be someone to protect shareholders from being overcharged or otherwise taken advantage of by a fund's managers, Congress provided that at least 40 percent of a mutual fund's directors must be unaffiliated. The trouble with this, Pomerantz told a Senate committee last summer, is that the unaffiliated directors are usually appointed by the affiliated ones. "It won't surprise any sophisticated person to learn that the affiliated

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people don't pick toughies. They pick fellows who are friends of theirs and who are likely to be kind of—again, I don't want to use harsh adjectives like 'submissive' or 'dominated,' but let's say friendly."

Pomerantz cannot force fund managers to reduce their fees just by going into court and complaining that the fees are unreasonably high. Fee schedules are regularly submitted to the shareholders for ratification, and the courts have supported the managers' contention that the annual meeting, not a courtroom, is the proper forum for dissatisfied shareholders. In each of his suits, however, Pomerantz has charged that one or more of the supposedly unaffiliated directors were actually under the managers' domination. (The unaffiliated directors of Fundamental Investors, for example, included a son of the chairman of the firm that was handling the fund's investments.)

If a judge or jury had agreed with Pomerantz in any of these cases, the court could have found that the fund managers were operating under an invalid contract. In this event—as Pomerantz pointed out to the funds' attorneys—the managers might have been required to return to the fund every dollar they had collected in fees. Pomerantz was quite sure that the managers, rather than run this risk, would settle the case by agreeing to lower their fees. The record has borne him out.

One-dollar justice

In the last eighteen months, besides launching a half a dozen new mutual-fund suits, Pomerantz has begun eleven so-called representative actions. In these suits the plaintiff does not sue on behalf of a corporation, but as the representative of a class of persons, all of whom have been allegedly injured in a similar way. In the past such suits were extremely risky. In 1937, for example, Pomerantz brought a representative suit against the Brooklyn Union Gas Co. on behalf of a Brooklyn accountant, Marcel Kovarsky, and several hundred thousand other customers of the company. Kovarsky contended that over a period of years the company had collected $2 million in one-dollar "reconnection charges" to which it was not legally entitled. "Justice triumphed," Pomerantz says. "The court ruled that Mr. Kovarsky should not have been socked with a reconnection charge. But it also held that we had brought a spurious class action—if other customers wanted their dollars back they would have to sue for them individually. I had recovered one dollar, and no more, and there went my fee. I wept long and copiously."

As a result of a Supreme Court ruling in 1966, a lawyer who brings a representative action in a federal court no longer runs this risk. The court must now decide at the outset whether the plaintiff and his lawyer represent a true class in the meaning of the law. In most of the representative actions Pomerantz now has under way, he is seeking damages for persons who were allegedly defrauded when they bought certain securities. For example, he is suing McDonnell Douglas Corp. on behalf of all persons who bought Douglas Aircraft convertible bonds in the summer of 1966. Pomerantz' charge is that they bought the bonds in an atmosphere generated by false and misleading company statements about Douglas' earnings. He has also brought suit against the two New York brokers, Carlisle & Jacquelin and DeCoppet & Doremus, that handle almost all odd-lot transactions on the New York Stock Exchange. He has accused the brokers of illegal price

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fixing, and is asking for damages for *everybody* who made an odd-lot purchase or sale between 1960 and 1966.

In Pomerantz' lifetime, the social status of the stockholder lawyer has improved. Even many corporation lawyers now believe that some of the full-disclosure provisions of the post-1929 securities laws can be more efficiently policed by lawyers like Pomerantz than by the government. This view is shared, at least in part, by Chairman Manuel Cohen of the SEC, who recently told an audience of lawyers in New York that the commission doesn't have the manpower to go after all corporate insiders who cut corners. He added, "Proper redress of private wrongs must not be denied because of the inadequacy of our resources or because of our unwillingness, for any reason, to champion every cause."

That old devil self-interest

As a device for keeping corporate officers honest, however, the stockholder suit has a serious flaw. In a 1964 opinion Judge Henry J. Friendly of the U.S. Court of Appeals pointed out, "The plaintiff stockholders or, more realistically, their attorneys have every incentive to accept a settlement that runs into high six figures or more, regardless of how strong the claims for much larger amounts may be . . . A juicy bird in the hand is worth more than the vision of a much larger one in the bush."

In the federal courts, as well as in the courts of most states, a proposed settlement of a shareholder suit can become final only after a judicial hearing as to its fairness, and after other stockholders have had a chance to object. But even if a judge suspects that the plaintiff's lawyer has chosen the bird in the hand, he is usually reluctant, in view of his necessarily incomplete knowledge of the case, to insist on an all-out attempt to get the bird in the bush.

This puts a heavy burden on the conscience of the plaintiff's lawyer. Pomerantz points out, "There's no flesh-and-blood client you have to look in the eye while you're explaining why you want to settle for a tenth of what you are suing for. In a suit where you're representing 40,000 stockholders, there's always the temptation to tell yourself, 'Well, I'm getting them something; why knock myself out?' In the end it's a matter of plain conscience." Pomerantz finds this depressing, since he believes that conscience is a weak reed to lean on in business affairs. "My professional experience has taught me that fiduciary duty usually succumbs to that old devil self-interest or acquisitiveness."

In certain moods, Pomerantz likes to argue that he is really a lazy man despite the ferocious amount of work he does. "I have no compulsive need to work," he said recently. But he has no intention of retiring, or even of slowing down very much. He is enormously enthusiastic, for instance, about making use of representative actions to disabuse dishonest businessmen of the idea that they are relatively safe if they cheat enough people out of small enough sums of money. He concedes that his case against the odd-lot dealers may be thrown out—he has already lost in one court—but in sanguine moments he sees it as the harbinger of a new era. Over dinner not long ago, he said, "New doors have been opened up. For the first time in the history of jurisprudence, you can have self-appointed public prosecutors, undertaking to obtain redress for people all over the world. In that one lawsuit I've got 3,750,000 clients. I'll bet no one in history has ever represented so many people." END